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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 PETITION TO AMEND RULE 123,
10 RULES OF THE SUPREME COURT
11 OF ARIZONA, RULE 2.3, ARIZONA
12 RULES OF CRIMINAL PROCEDURE
13 and
14 RULE 5, ARIZONA RULES OF
15 CIVIL PROCEDURE

Supreme Court No. R-08-0039

**Comment of the State Bar of Arizona
Regarding Petition to Amend Rule 123,
Rules of the Supreme Court of Arizona,
Rule 2.3, Arizona Rules of Criminal
Procedure and Rule 5, Arizona Rules of
Civil Procedure**

16 With certain exceptions, the State Bar of Arizona supports the petition's proposals
17 to adopt and amend rules to improve and promote public access to court records in
18 Arizona. For the reasons noted below, however, the State Bar has concerns with respect
19 to:

20 (1) the ambiguity of "victim," "other locating information," and "filer" as those
21 terms are set forth in proposed Rule 5(f) of the Arizona Rules of Civil Procedure
22 ("Proposed Rule 5(f)"), and the likely conflict between the requirements of Proposed Rule
23 5(f)(A)(4) and the rule-required inclusion of addresses in routine filings in civil matters;

24 (2) the failure to shield the names of all juveniles under Proposed Rule
25 5(f)(A)(3) or to include all juvenile names within the definition of "sensitive data" under
26 proposed Rule 123(b)(15) of the Rules of the Supreme Court ("Proposed Rule 123"); and

1 (3) the failure to include date of birth within proposed Rule 5(f)(A) or the
2 definition of “sensitive data” under Proposed Rule 123(b)(15).

3 Further, to the extent the Court determines to adopt Proposed Rule 5(f), the State
4 Bar recommends re-designation of the various section and subsection headings of the
5 proposed Rule, and correction of typographical/grammatical errors that the proposed Rule
6 now contains.

7 The State Bar’s position is guided and informed by its understanding that the rule
8 revisions proposed by the petition seek to strike a balance between the competing interests
9 of the public’s right to access court records and the protection of the privacy rights of
10 litigants and other members of the public involved in the justice system. Attached as
11 Exhibit A are red-line versions of Proposed Rule 123(b)(15) and Proposed Rule 5(f)
12 reflecting the revisions suggested in this Comment.

13 **Proposed Rules 5(f)(A) and (B)**

14 **A. Ambiguity of Terms in Proposed Rules 5(f)(A) and (B).**

15 **1. Who is a “Victim” and what is “Other Locating Information”?**

16 Under Proposed Rule 5(f), any person filing a document in a civil case must refrain
17 from including specified “sensitive data” in any pleading, document or exhibit filed with
18 the court. This sensitive data includes social security numbers (Proposed Rule
19 5(f)(A)(1)), financial account numbers excepting the last four digits of any such number
20 (Proposed Rule 5(f)(A)(2)), a juvenile “victim’s” name (Proposed Rule 5(f)(A)(3)), and a
21 “victim’s” address, telephone number or other “locating information.” Proposed Rule
22 5(f)(A)(4). Similarly, the definition of “sensitive data” included in Proposed Rule 123
23 contains references to a “juvenile victim’s name” and a “victim’s address and telephone
24 number or other locating information.” See Proposed Rule 123(b)(15).

25 To the State Bar’s knowledge, however, neither the Rules of the Supreme Court
26 nor the Arizona Rules of Civil Procedure furnish any definitions for the terms “victim” or

1 “other locating information.” Moreover, while various types of civil claims (such as those
2 for intentional torts or civil racketeering) are brought by plaintiffs who could be
3 characterized as alleged “victims,” the term “victim” is not a term of art in civil practice.
4 As such, at least in the civil context, the proposed Rule’s use of the term “victim” is
5 ambiguous, requiring speculation as to what classes of parties or witnesses are included in
6 its definition.

7 The term, however, is defined in the criminal law setting. A.R.S. § 13-4401(19)
8 defines the term “victim” as:

9 [A] person against whom the criminal offense has been committed,
10 including a minor, or if the person is killed or incapacitated, the person’s
11 spouse, parent, child, grandparent or sibling, any person related to the
12 person by consanguinity or affinity to the second degree or any other lawful
13 representative of the person, except if the person or the person’s spouse,
parent, child, grandparent, sibling or other person related to the person by
consanguinity or affinity to the second degree or other lawful representative
is in custody for an offense or is the accused.

14 Use of that definition for a “victim” under Proposed Rule 5(f)(A)(3) and (4) is
15 problematic, however, as it would require a party or civil practitioner to determine
16 whether a “criminal offense” had been committed under the facts at issue. Making such a
17 determination would require an evaluation of “probable cause” on the part of a peace
18 officer or prosecutor with respect to whether a felony or certain types of misdemeanors
19 have occurred. See A.R.S. § 13-4401(6). The State Bar submits that it is likely that many
20 parties and civil practitioners are neither sufficiently informed nor experienced so as to
21 permit them to conduct this analysis.

22 Likewise, apart from a person’s address and telephone number (separately listed in
23 Proposed Rule 5(f)(A)(4)), the proposed Rule offers no guidance as to the scope of
24 information falling within the phrase “other locating information” as separately referenced
25 in Proposed Rule 123(b)(15) and Proposed Rule 5(f)(A)(4).
26

1 A rule lacking clarity invites unintentional violation. Neither counsel nor litigants
2 should be required to guess as to the class of persons included within the word “victim” or
3 the types of information included within the phrase “locating information,” especially in
4 light of the possibility of court-imposed sanctions under Proposed Rule 5(f)(C). Given the
5 ambiguity of those terms and the reasons set forth below in section B, the State Bar
6 recommends that Proposed Rule 5(f)(A)(4) not be adopted.¹

7
8 **2. Who is a “Filer”?**

9 Proposed Rule 5(f)(A) and (B) make reference to a “filer,” a term undefined in the
10 Rules of the Supreme Court and Arizona Rules of Civil Procedure. For sake of specificity
11 and clarity, the State Bar recommends replacing the word “filer” in Proposed Rule 5(f)(A)
12 and the phrase “counsel, the parties or any other filer” in Proposed Rule 5(f)(B) with the
13 phrase “a person making a filing with the court,” a description encompassing parties,
14 counsel and non-parties. Likewise, the State Bar recommends rewording Proposed Rule
15 5(f)(A)(3) so as to eliminate its reference to “filer.”

16 **B. Conflicts Between Proposed Rule 5(f)(A)(4) and Required, Routine**
17 **Filings.**

18 Even if the term “victim” could be defined in a manner that could be easily
19 understood by civil practitioners and parties, the State Bar is concerned that Proposed
20 Rule 5(f)(A)(4) would conflict with a number of rules that require addresses and other
21 locational information to be included in routine civil filings.

22 For example, Rule 4(g) requires the return of service of a summons to “make
23 proof . . . to the court” of service. Typically, such proof must include the identity of the
24 individual or entity served and, with respect to individuals served at their “dwelling house

25 ¹As discussed later in this Comment, concerns with respect to the use of the word
26 “victim” as applied to juveniles may be cured by extending the prohibitions of Proposed
Rule 5(f)(A)(3) to all juveniles, irrespective of whether they are “victims.”

1 or usual place of abode” under Rule 4.1(d), identification of the person’s address.
2 Similarly, Rule 45(b) requires the filing of a proof of service of a subpoena, which, if
3 accomplished under Rule 4.1(d), may require inclusion of the address of the person
4 served. Finally, Rule 5(c)(3) requires all filed documents to include a certificate of
5 service indicating the date and manner of service upon all parties having made
6 appearances in an action. Although not expressly required by the Rule, certificates of
7 service typically include the address of unrepresented parties served by mail under Rule
8 5(c)(2)(C) to establish the manner and effectiveness of service.

9 While likely not Petitioner’s intent, if a party or witness in a civil matter is a
10 “victim” within the meaning of Proposed Rule 5(f)(A)(4), counsel and parties to the action
11 face the possibility of sanctions under Proposed Rule 5(f)(C) if they include the address of
12 such a person in a proof or certificate of service filed in compliance with the rules
13 described in the preceding paragraph. The State Bar believes that, as drafted, Proposed
14 Rule 5(f)(A)(4) may place parties and counsel in the untenable position of choosing
15 between violating the Proposed Rule or violating existing rules requiring proof through
16 inclusion in court filings of information otherwise barred by Proposed Rule 5(f)(A)(4).

17 For these reasons and those set forth in the preceding section, the State Bar
18 recommends that Proposed Rule 5(f)(A)(4) not be adopted.

19 Use of Names of Juveniles

20 Pursuant to Proposed Rule 5(f)(A)(3), persons making filings with a court are
21 directed to take measures to shield the names of “juvenile victims.” Similarly, Proposed
22 Rule 123(b)(15) includes “a juvenile victim’s name” within the definition of “sensitive
23 data.” As discussed above, uncertainty about who is a “victim” is likely to cause
24 confusion among parties and counsel. Such concerns, however, may be alleviated
25 altogether with respect to juveniles if the prohibitions contained in Proposed Rule
26 5(f)(A)(3) and the definition of “sensitive data” in proposed Rule 123(b)(15) are extended

1 to all juveniles, regardless of whether they are “victims.” Such treatment would be
2 consistent with Rule 5.2(a)(3) of the Federal Rules of Civil Procedure, which requires that
3 any minor be referred to only by his or her initials. Accordingly, the State Bar
4 recommends removing all references to the word “victim” set forth in Proposed Rule
5 5(f)(A)(3) and extending the definition of sensitive data under proposed Rule 123(b)(15)
6 to include the names of all juveniles.

7 **Exclusion of Date of Birth from Definition of “Sensitive Data”**

8 Neither the definition of “sensitive data” set forth in Proposed Rule 123(b)(15) nor
9 the types of information specified in Proposed Rule 5(f)(A) include a person’s date of
10 birth. Petitioner may have purposefully excluded date of birth for reasons not expressed
11 in the petition. The State Bar notes that, pursuant to Rule 5.2(a) of the Federal Rules of
12 Civil Procedure, a person making a filing in federal court may include only the year of an
13 individual’s birth. Given that many financial institutions and other businesses use a
14 customer’s date of birth for identification and account access purposes, absent a sound
15 reason for exclusion, the State Bar believes that a person’s date of birth should be
16 included in the definition of sensitive data under Proposed Rule 123(b)(15) and persons
17 making filings with a court should be limited to referencing an individual’s year of birth
18 under Proposed Rule 5(f)(A).

19
20 **Renumbering of Section and Subsection Headings in Proposed Rule 5(f),
21 and Correction of Typographical/Grammatical Errors**

22 Proposed Rule 5(f) is divided into three sections (denominated A through C), with
23 section A having four subsections (denominated 1 through 4). The use of consecutive
24 alphabetic headings is stylistically awkward and inconsistent with the predominant
25 manner in which section and subsection headings are denominated throughout the Arizona
26 Rules of Civil Procedure. Instead, the State Bar recommends re-designating sections A

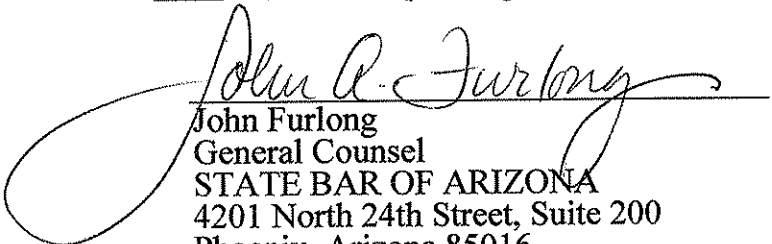
1 through C as sections (1) through (3), and re-designating subsections 1 though 4 as
2 subsections (A) through (D).

3 Finally, Proposed Rule 5(f) contains several typographical/grammatical errors
4 requiring correction. In Proposed Rule 5(f)(B), the first letter of each of the words "rule,"
5 "rules," "supreme" and "court" should be capitalized. Likewise, the word "insure" set
6 forth in Proposed Rule 5(f)(C) should be stricken and replaced with the word "ensure."

7 **Conclusion**

8 The State Bar supports petitioner's effort to promote public access to court records
9 in a manner which seeks to protect the privacy concerns of litigants and other persons
10 involved in judicial proceedings and, subject to the specific concerns, comments and
11 recommendations set forth here, the State Bar supports the proposed amendment of Rule
12 123 of the Rules of the Supreme Court and the adoption of Proposed Rule 5(f) of the
13 Arizona Rules of Civil Procedure.

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15 RESPECTFULLY SUBMITTED this 30th day of March, 2009.

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23 Electronic copy filed with the
24 Clerk of the Supreme Court of Arizona
25 this 30th day of March, 2009.

26 by: Kathleen A. Lundgren

EXHIBIT A

1 ***State Bar's Proposed Revision of Proposed Supreme Court Rule 123***
2 *(proposed additions are shown by underscoring and deletions are shown by "strike-through")*

3 **Rule 123. Public Access to the Judicial Records of the State of Arizona.**

4 * * *

5 **(b) Definitions.**

6 * * *

7 (15) *Sensitive Data.* "Sensitive Data" means social security number, bank
8 account number, credit card number, other financial account number, date of birth, a
9 juvenile's ~~victim's~~ name, and a victim's address and telephone number or other
10 locating information.

11
12
13 ***State Bar's Proposed Revision of Proposed Rule 5(f) of the Arizona Rules of Civil***
14 ***Procedure*** *(proposed additions are shown by underscoring and deletions are shown*
15 *by "strike-through")*

16 **Rule 5. Service and filing of pleadings and other papers.**

17 * * *

18 **Rule 5(f). Sensitive Data**

19 ~~A.~~(1) In all civil cases, a ~~filer~~ person making a filing with the court shall
20 refrain from including the following sensitive data from all pleadings or other
21 documents filed with the court, including exhibits thereto, whether filed
22 electronically or in paper, unless otherwise ordered by the court or as otherwise
23 provided by law:

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1 1.(A) Social Security Numbers. If an individual's social security
2 number must be included in a pleading or other document, only the last four digits of
3 that number shall be used.

4 2.(B) Financial Account Numbers. If financial account records are
5 relevant or set forth in a pleading or other document, only the last four digits of these
6 numbers shall be used.

7 3.(C) Juvenile's Victim's Name. If a juvenile victim must be
8 identified in a pleading or other document, only the initials of the juvenile victim
9 shall be used. In the alternative, the filer may reference may be made to the juvenile
10 victim in a manner that shields the identity of the juvenile victim in the context of the
11 proceeding, for example, by symbol, such as child a, child b, or as doe 1, doe 2, ~~or by~~
12 ~~the child's juvenile's status, such as victim.~~

13 4.(D) ~~Victim's Address And Telephone Number Or Other Locating~~
14 ~~Information. If a victim's address is relevant, only the city and state shall be used.~~
15 Date of Birth. If a person's date of birth is relevant, only the year of the person's
16 birth shall be used.

17 B. (2) The responsibility for redacting sensitive data shall rest solely with
18 ~~counsel, the parties, or any other filer~~ a person making a filing with the court. The
19 clerk of the court or the court is not required to review documents for compliance
20 with this rule, seal documents that contain sensitive data on the clerk's own initiative,
21 or redact pleadings and other documents. However, subject to ~~rule~~ Rule 123, ~~rules~~
22 Rules of the ~~supreme~~ Supreme ~~court~~ Court of Arizona, each court shall develop
23 procedures for correcting data errors, redacting sensitive data, and sealing case
24
25
26

1 records in a civil case that is subject to availability by remote electronic access when
2 such errors, sensitive data, and sealing are brought before the court.

3 ~~C.~~ (3) For violation of this rule, the court may impose sanctions against
4 counsel or the parties to ~~insure~~ ensure future compliance with this rule.
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